Thereupon the magistrate made an order for discharge *simpliciter* and not an acquittal. This clearly is wrong. When there is no acquittal an accused person is liable to be retried on the same charge. Accordingly, when the Deputy Public Prosecutor decided to enter a *nolle prosequi*, it is not fair to have a charge hanging over an accused person indefinitely. It has been the established practice to acquit in such cases. Therefore, acting in revision, under section 323 of the Criminal Procedure Code, I direct that the order made be amended to one of acquittal.

Order substituted to one of acquittal.

YONG KUAN TEIK v. DEVAN NAIR

[O.C.J. (Ismail Khan J.) September 26, 1964]
[K.L. — Election Petition No. 1 of 1964]

Election Petition — Failure to serve notice of presentation of petition within ten days of such presentation — Whether irregularity or nullity — Election Offences Ordinances, 1954, s. 38(1) — Election Petition Rules, 1954, rr. 10 & 15.

This was an application to strike out an election petition on the ground that notice of the presentation of the petition was not served by the petitioner on the respondent within ten days of such presentation as required under rule 15 of the Election Petition Rules, 1954.

Held: the provisions of rule 15 of the Election Petition Rules, 1954 are mandatory and failure to comply with them renders the petition a nullity.

Cases referred to:—

(1) *Au-Yong* v. *Dicum & Anor.* [1963] M.L.J. 349

(2) *Sheldon* v. *Brown Bayley's Steelworks Ltd. & Anor.* [1953] 2 All E.R. 894.

(3) *Re a Debtor* (No. 441 of 1938) *Ex parte Petition Creditor* v. *Debtor* [1938] 4 All E.R. 92.

(4) *Pike* v. *Michael Nairn & Co. Ltd.* [1960] 2 All E.R. 184.

(5) *Pritchard* v. *Deacon* [1963] 2 W.L.R. 685.

(6) *Williams* v. *Mayor of Tenby & Ors.* (1879) L.R. 5 C.P.D. 135.

ELECTION PETITION.

R. Ponnudurai and *V. K. Palasuntharam* for the petitioner.

Yong Pung-How and *E. W. Barker* for the respondent.

Cur. Adv. Vult.

Ismail Khan J.: This is an application to strike out an election petition on the ground that notice of the presentation of the petition was not served by the petitioner on the respondent within ten days of such presentation as required under rule 15 of the Election Petition Rules, 1954.

In this case the election was held on the 25th April, 1964, to elect a member for Bungsar Ward to the Dewan Ra'ayat. The result of the election was published in the *Gazette* on 11th June, 1964, the respondent being returned as duly elected. On 29th June, 1964, the petition was lodged with the Registrar of the High Court at Kuala Lumpur, that is, within twenty-one days, under section 38(1) of the Election Offences Ordinance, 1954. The respondent did not avail himself of the provisions of rule 10 of the above rules to leave with the registrar a writing, appointing an advocate and solicitor to act as his solicitor in case there should be a petition against him or stating that he intended to act for himself. He left no address with the registrar at which notices addressed to him might be left.

On 7th July, 1964, the registrar wrote to the petitioner's solicitors, in reply to their letter of 3rd July, 1964, that the respondent had left no address for service. On the same day the petitioner's solicitors sent to the Registrar a copy of the petition and a copy of the notice of presentation of the petition. On 11th July, 1964, they wrote to the Registrar requesting him to effect service of the petition and notice on the respondent at what was described in their letter as the "Respondent's permanent place of abode No. 12B, Bintong Park, Singapore". However, on 23rd July, 1964, the petitioner published a notice of the presentation of the petition in the *Gazette*. On the same day the respondent appointed his solicitors, Messrs. Shook Lin & Bok, to appear for him in the matter of the petition. On 17th August, 1964, the respondent obtained an order for the petitioner to deliver to him certain particulars.

On 25th August, 1964, the respondent took out this summons to strike out the petition.

The application is resisted by Mr. Palasunthram for the petitioner on various grounds. I shall dispose of his first two objections which, in my opinion, are without any merit. It was argued for the petitioner that under rule 10, as the respondent had failed to appoint an advocate and solicitor or to leave an address for service, the petitioner need only to leave the notice with the registrar and that this would be deemed good service. I do not think Mr. Palasunthram can be seriously pressing this point. Rule 15 contains the relevant provision as to the service of notice. It reads:—

"Notice of the presentation of a petition, accompanied by a copy thereof, shall, within ten days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the solicitor appointed by the respondent under Rule 10 of these Rules or by posting the same in a registered letter to the address given under Rule 10 of these Rules at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no solicitor has been appointed, or no such address given, by a notice published in the *Gazette* stating that such petition has been presented, and that a copy of the same

may be obtained by the respondent on application at the office of the Registrar."

The only mode of service then, where the respondent has failed to appoint a solicitor or to leave an address for service, is publication in the *Gazette*. In fact, the petitioner did adopt this mode of service when he published the notice in the *Gazette* on 23rd July, 1964. It was then contended that the period of ten days would apply only to the service on the respondent's solicitors or to the posting of the notice to the respondent's address and that there was no limitation of time as regards the publication of the notice in the *Gazette*. Such a construction is certainly not warranted by the plain language of rule 15. The first limb thereof states clearly the period within which service is to be effected. The next merely sets out the various methods of service open to the petitioner and it is clear that, whichever method is adopted, it has to be effected within ten days of presentation of the petition.

The last objection pressed upon me is that the failure to comply with rule 15, that is, to serve the notice within the period of ten days, was a mere irregularity which was validated by the respondent, when he took a step in the proceedings by obtaining the order for particulars on 17th August, 1964. In support of this, Mr. Palasuntharam referred to the following cases:— *Au-Yong* v. *Dicum & Anor.*,[1] *Sheldon* v. *Brown Bayley's Steelworks, Ltd. & Anor.*,[2] *Re A Debtor (No. 441 of 1938), Ex parte Petitioning Creditor* v. *Debtor*,[3] *Pike* v. *Michael Nairn & Co., Ltd.*[4]

Only the first two cases need call for any comment.

It was held in the first case that the service of an unsealed and unsigned copy of the bankruptcy notice contrary to the Bankruptcy Rules was a mere irregularity which had occasioned no injustice to the debtor. That case has no application. There, section 131 of the Bankruptcy Ordinance was invoked. That section has no counterpart in our Election Petition Rules. Even there, it was observed by Thomson, C.J. (as he then was) that the first question which had to be considered in relation to the application of section 131 is "whether what is complained of is an irregularity. If any non-compliance with the requirements of the law goes beyond being a mere irregularity and amounts to something that renders the proceedings a nullity that is, of course, the end of the matter and the section has no application."

In the next case — *Sheldon* v. *Brown Bayley's Steelworks, Ltd. & Anor.*[2] — a plaintiff in an action under the Fatal Accidents Act, 1846, issued a writ within twelve months of the death as required by section 3 of that Act, but only effected service of it more than twelve months after its date, when by virtue of R.S.C. Order 8, rule 1, it had ceased to be in force. The defendants entered an unconditional appearance and then applied to have the writ set aside on the ground that it had become a nullity. It was held that the failure to serve within the prescribed time was only an irregularity which had been waived by the defendants' unconditional appearance. That case can be distinguished. There, although the writ was no longer in force after the twelve months, it could be renewed under Order 64, rule 7, which reads:—

> "A Court or a Judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed. Provided that when the time for delivering any pleading or document or filing any affidavit, answer or document, or doing any act is or has been fixed or limited by any of these Rules or by any direction on or under the summons for directions or by an order of the Court or a Judge the costs of any application to extend such time and of any order made thereon shall be borne by the party making such application unless the Court or a Judge shall otherwise order."

This rule is in terms identical with our rule. But this is a rule permitting an enlargement of time "appointed by these Rules or fixed by an order enlarging time for doing any act or taking any proceeding". In the instant case, the time for service is prescribed, not by the Rules of the Supreme Court, but by Statute, and there is no provision for enlargement of time in the Election Petition Rules.

Mr. Barker for the respondent contended that because of the absence of the notice of presentation of the petition, the petition is a nullity and is therefore incurable. No attempt is made in the cases to define what is a nullity or a mere irregularity. Most of these cases were reviewed in *Pritchard* v. *Deacon & Others*,[5] and it would appear that what were regarded as irregularities were merely defects of procedure which fell within Order 70.

In the present case, it seems to me that the absence of a notice of service is something more than a mere irregularity. The case most in point is *Williams* v. *The Mayor of Tenby & Ors.*[6] The decision there turns on the construction of section 13(4) of the Municipal Elections Act, 1872, (35.36 Vic. c. 60). That sub-section is similar to rule 15 of our Election Petition Rules, with this variation, that the notice of the presentation as well as notice of the proposed security had to be served on the respondent within a period of five days. It reads as follows:— "Within five days after the presentation of the petition the petitioner shall serve on the respondent a notice

of presentation and of the notice of the proposed security and a copy of the petition." In that case, the respondent applied to strike out the petition on the ground that no notice of presentation of the petition and of the proposed security was served on him. It was urged for the petitioner that while the provisions regarding the presentation of the petition within the period of twenty-one days were peremptory, those of sub-section (4) were not imperative. It was held, however, by the Court of Appeal, that they were peremptory and that the terms not complied with were a condition precedent to the election petition. The same principle would apply in this case.

I therefore hold that the provisions of rule 15 are mandatory and the breach thereof renders the petition a nullity.

As to the suggestion that it would be a hardship if the mere absence of notice should be held to operate against the petition, I need only refer to the observation of Groves J. in the above case at page 137:—

"It is said that there would be hardship supposing money deposited, if mere omission of notices should prevent a petition. I see no more hardship than may occur in any case where a definite time is to be observed."

Earlier in his judgment, his Lordship had also said this:—

"The meaning of the enactment is that the petition shall not be kept long hanging over the heads of persons elected in municipal corporations. The petition must be presented in twenty-one days, and during that time the petitioners should read the Act and ascertain what they have to do. We have found great inconvenience in ordinary cases where the court have power to extend the time, for we are much occupied with applications for extension of time, and in many cases it is most important that the time of proceeding should be limited, and that persons should know when they are safe."

Petition struck out.

Solicitors: *Rajendra & Teik Ee; Shook Lin & Bok.*

MUI WING SHUI v. NGEOW JOO CHONG

[O.C.J. (Winslow J.))September 30, 1964]

[Singapore — Suit No. 1409 of 1963]

Contract — Claim for money had and received — Illegal transaction — Whether party to an illegal transaction can recover money due under such transaction.

Civil Law Ordinance, (Cap. 24), s. 6 — Singapore Turf Club Sweepstakes ticket.

Common Gaming Houses Ordinance, 1961, ss. 23 and 24 — Selling lottery tickets by unauthorized person — Public lottery.

The plaintiff claimed $24,814 plus interest, which he alleged to be the difference between $104,814, the prize of a Singapore Turf Club Sweepstakes ticket, and $80,000 paid to the plaintiff by the defendant after the latter had collected the prize money. The plaintiff had bought the ticket from one of the shop-assistants at the defendant's medical store and the tickets formed part of an allotment which the defendant purchased from an authorized agent of the Singapore Turf Club. The defendant, *inter alia*, pleaded that the plaintiff was barred by section 6 of the Civil Law Ordinance because the plaintiff's claim was based on a contract or agreement by way of wagering or gaming which was rendered illegal, null and void.

Held: (1) before a public lottery conducted by the Turf Club in Singapore can be said to confer immunity from prosecution on all persons participating therein it must be shown that such a lottery is being conducted by the duly authorized officers or agents of the Turf Club at places subject to the supervision or control of one or more of its officers;

(2) in selling the lottery tickets at his shop the defendant was operating a distinct public lottery on his own which was beyond the protection of the exemption conferred by sections 23 and 24 of the Common Gaming Houses Ordinance, 1961;

(3) although the plaintiff was an innocent party to the illegal transaction, the court will not lend its aid to him as the cause of action arose from a transgression of the law.

[Editorial Note: It is regretted that the case of *Palaniappa Chettiar* v. *Arunasalam Chettiar* [1962] M.L.J. 143, P.C. which also deals with an illegal transaction was not brought to the notice of the learned trial judge].

Cases referred to:—

(1) *Kader Batcha* v. *Public Prosecutor* [1935] M.L.J. 252.

(2) *R.* v. *Latif bin Haidin* [1935] M.L.J. 84.

(3) *G. Benjamin* v. *M. Esmailjee* [1936] M.L.J. 251.

(4) *Bridger* v. *Savage* (1885) 15 Q.B.D. 363.

(5) *De Mattos* v. *Benjamin* (1894) 63 L.J. Q.B. 248.

(6) *Seong Sam* v. *Goon Food On* [1934] M.L.J. 68.

(7) *Lim Lian Wah* v. *Lee Ah Kiew* 7 F.M.S.L.R. 66.

(8) *Harry Parker Ltd.* v. *Mason* [1940] 4 All E.R. 201.

(9) *Holman* v. *Johnson* (1775) 1 Cowp. 343.

(10) *Sykes* v. *Beadon* (1879) 11 Ch. D. 170.

CIVIL SUIT.

N. A. Christopher for the plaintiff.

Harry Wee for the defendant.

Winslow J.: The plaintiff's claim is for $24,814 plus interest at 6 per cent per annum from 12th March 1963 for money had and received by the defendant as servant or agent of the plaintiff and to his use.

This sum of $24,814 is alleged to be the difference between $104,814 being the prize due on Singapore Turf Club Sweepstakes ticket No. C654526 which won the first prize at a draw held on 17th February 1963 and $80,000 paid to the plaintiff by the defendant after the latter had collected the prize money on the former's behalf.

The defendant denies this debt but admits receiving the ticket in question from the plaintiff for the purpose of collecting the prize on the plaintiff's behalf. He however claims that the plaintiff made an outright gift of $24,814 of the